

other request for Commission action, or a pleading in the nature of a complaint (other than a section 208 complaint), which meets the following requirements:

(1) The caption and text of a pleading make it unmistakably clear that the pleading is intended to be a formal opposition or formal complaint;

(ii) The pleading is served upon the other parties to the proceeding or, in the case of a complaint, upon the person subject to the complaint; and

(iii) The pleading is filed within the time period, if any, prescribed for such a pleading;

(2) A formal complaint under section 208 of the Communications Act if it meets the requirements of §1.721 *et seq.* of the Commission's Rules (formal complaints against common carriers).

(f) *Sunshine Agenda period.* For purposes of this subpart, the Sunshine Agenda period is defined as the period of time that commences with release of a public notice that a matter has been placed on the Sunshine Agenda and that terminates when the Commission:

(1) Releases the text of a decision or order relating to the matter, or

(2) Issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or

(3) Issues a public notice stating that the matter has been returned to the staff for further consideration,

whichever one of the above occurs first.

[52 FR 21052, June 4, 1987, as amended at 52 FR 37459, Oct. 7, 1987; 53 FR 26597, July 14, 1988; 54 FR 29038, July 11, 1989]

SUNSHINE PERIOD PROHIBITION

§ 1.1203 Sunshine period prohibition.

(a) Unless exempted under §1.1204(b), the making of any presentation, whether *ex parte* or not, to decision-making personnel concerning matters listed on the Sunshine Agenda is prohibited during the Sunshine Agenda period. See §1.1202(f).

(b) The prohibition on presentations in §1.1203(a) above shall not apply to responses to *ex parte* presentations that are requested under §1.1204(b)(7) or to presentations regarding settlement agreements. The disclosure requirement set forth in §1.1204(b)(7) Note will apply.

(c) The prohibition in §1.1203(a) above shall not apply to presentations (not otherwise exempted under §1.1204(b)) made by members of Congress or their staff or by other agencies or branches of the Federal Government or their staff in non-restricted proceedings under §1.1203(b), exempt proceedings under §1.1204(a)(2) (not involving the allotment of a channel in the radio broadcast or television broadcast services), or exempt proceedings under §1.1204(4)-(11).

NOTE: Unless otherwise exempted under §1.1204, presentations under §1.1203(c) that are of substantial significance and clearly intended to affect the ultimate decision, shall be placed (if oral, a written summary of the presentation) in the record of the proceeding by Commission staff or in accordance with the procedures set forth in §1.1206(a)(1)-(3).

[52 FR 21052, June 4, 1987, as amended at 52 FR 37459, Oct. 7, 1987; 53 FR 44196, Nov. 2, 1988; 54 FR 29038, July 11, 1989]

GENERAL EXEMPTIONS

§ 1.1204 General exemptions.

(a) *Proceedings in which no ex parte restrictions apply.* Subject to the provisions of §1.1203 (Sunshine Period Prohibition), §1.1206 (Non-Restricted Proceedings), and §1.1206(b) (Restricted Proceedings), there are no *ex parte* restraints or disclosure requirements in the following types of proceedings:

(1) An adjudicative proceeding as defined in §1.1202(d) or other proceeding specified in §1.1206(c)(1)(ii) unless it

(i) Is formally opposed or involves a formal complaint (see §1.1202(e)); or

(ii) Involves mutually exclusive applications; or

(iii) Has been designated for hearing (see §1.1206(c)(1)(i)).

(2) A pending petition for rule making unless it

(i) Involves the allotment of a channel in the radio broadcast or television broadcast services, and

(ii) Is formally opposed (see §1.1206(c)(2)).

NOTE: In proceedings exempted by §1.1204(a)(1) or (a)(2)(1), oral *ex parte* communications are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral

or written) are subject to ex parte procedures set forth in § 1.1206 barring oral ex parte contacts except where confidentiality is necessary to protect these persons from possible reprisals. Oral communications between Commission staff and advisory coordinating committee members with respect to coordination of assignment of frequencies in the private land mobile services and fixed services authorized under section 331 of the Communications Act are not prohibited.

(3) A request for information which is filed pursuant to the Freedom of Information Act, 5 U.S.C. 552, unless it is formally opposed and where the requested information is not the subject of a request for confidentiality.

(4) A notice of inquiry proceeding unless the Commission states otherwise, see § 1.1206(b)(2).

(5) A proceeding involving an informal complaint against a carrier under section 208 of the Communications Act (see § 1.711 of the Rules) unless it has been designated for hearing.

(6) A tariff proceeding under section 203, 204, or 205 of the Communications Act unless it has been set for investigation, (see § 1.1206(b)(6)). This exemption from the ex parte requirements shall also extend to requests for waiver or for special permission directly associated with a particular tariff filing made pursuant to these sections of the Act, unless the Commission states otherwise.

(7) A proceeding conducted pursuant to section 220(b) of the Communications Act for prescription of common carrier depreciation rates prior to release of a public notice of specific proposed depreciation rates for a carrier or carriers.

(8) A petition or request for declaratory ruling unless a formal opposition has been filed.

(9) A rule making proceeding conducted pursuant to section 201(a), 213(a), 221(c) or 222 of the Communications Act or section 201(c)(2) or 201(c)(5) of the Communications Satellite Act of 1962, unless the proceeding has been formally opposed or has been set for investigation by the Commission.

(10) A proceeding under section 221(a) of the Communications Act unless a formal request for hearing has been made by an entity specified in that section.

(11) A proceeding under section 214(a) of the Communications Act unless a formal opposition has been filed or the proceeding has been designated for hearing.

NOTE: In proceedings exempted by § 1.1204 (a)(8), (a)(9), (a)(10), or (a)(11), oral ex parte communications without disclosure pursuant to § 1.1206 are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral or written) are subject to ex parte procedures set forth in § 1.1206 requiring disclosure of such communications except where confidentiality is necessary to protect these persons from possible reprisals.

(b) *Exempt Ex Parte Presentations.* The following types of ex parte presentations are exempt from the prohibitions and requirements in § 1.1206 (non-restricted proceedings) and § 1.1206 (restricted proceedings) as follows:

(1) The presentation is authorized by statute or by the Commission's Rules, see, e.g., § 1.333(d).

(2) The presentation is made by or to the General Counsel or his or her staff and concerns judicial review of a matter which has been decided by the Commission.

(3) The presentation directly relates to an emergency in which the safety of life is endangered or substantial loss of property is involved; provided however, that if the presentation is oral, a written summary of the presentation shall be filed within a reasonable period of time thereafter.

(4) The presentation involves a military or foreign affairs function of the United States or classified security information.

(5) The presentation is to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction.

(6) The presentation is between Commission staff and an advisory coordinating committee member with respect to the coordination of frequency assignments to stations in the private land mobile services or fixed services as authorized by section 331 of the Communications Act.

(7) The presentation is requested by the Commission or staff for the clarification or adduction of evidence or for

resolution of issues, and the proceeding is a restricted proceeding which has not been designated for hearing, a non-restricted proceeding or an exempt proceeding.

NOTE: In a restricted proceeding, any new written information elicited from such a request and a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding. Where such service would be unduly burdensome because parties to the proceeding are numerous or because the materials relating to the presentation are voluminous, the Commission may waive such service by issuing a public notice which states that copies of the presentation and/or materials relating to it are available for public inspection and by including copies of the presentation and/or materials relating to it in the record of the proceeding. Where the Commission determines that such service of public notice, prior to designation of a matter for hearing, would interfere with the effective conduct of an investigation, it may dispense with such service or public notice. In a non-restricted proceeding, any new information elicited from such a request shall be disclosed in accordance with the procedures set forth in § 1.1206. Except as otherwise provided above, any new information received during the Sunshine period shall be fully disclosed in accordance with the above procedures or by other adequate means of notice the Commission deems appropriate.

(52 FR 21053, June 4, 1987, as amended at 52 FR 37460, Oct. 7, 1987; 53 FR 26597, July 14, 1988; 54 FR 29086, July 11, 1989)

NON-RESTRICTED PROCEEDINGS

§ 1.1206 Non-restricted proceedings; ex parte presentations generally permissible but subject to disclosure.

(a) Except as provided during the Sunshine Agenda period (see § 1.1203), *ex parte presentations are permissible in non-restricted proceedings if the following disclosure requirements are met:*

(1) *Written ex parte presentations made by persons outside the Commission.* Any person who makes or submits a written ex parte presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been

submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

(2) *Oral ex parte presentations made by persons outside the Commission.* Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

(3) *Ex parte presentations requested by persons within the Commission and spontaneous ex parte presentations.* A decision making person who requests an ex parte presentation should advise the person making the presentation that the presentation must be reflected in the public record before the Commission issues a final order in the relevant proceeding. Any person who makes a presentation under this paragraph shall comply with the requirements of paragraph (a)(1) or paragraph (a)(2), whichever is applicable.

NOTE 1: Unless otherwise exempted under Section 1.1204, presentations from members of Congress or their staff or from other agencies or branches of the Federal Government or their staff that are of substantial significance and clearly intended to affect the ultimate decision shall be treated as ex parte presentations and placed (if oral, a written summary of the presentation shall be prepared and placed) in the record of the proceeding by Commission staff or in accordance with the procedures set forth in Section 1.1206(a)(1)-(3).

NOTE 2: Where a written ex parte presentation (or memorandum summarizing an oral ex parte presentation) relates to more than one proceeding, two copies (or an original and one copy) shall be filed for each separate proceeding.

(4) *Notice of ex parte presentations.* The Commission's Secretary shall place in

the public file or record of the proceeding written ex parte presentations and memoranda reflecting oral ex parte presentations. The Secretary shall issue a public notice listing any written ex parte presentations or written summaries of oral ex parte presentations received by his office during the preceding week relating to any non-restricted proceeding.

NOTE 1: Interested persons should be aware that some ex parte filings, for example, those not filed in accordance with the requirements of this subsection, might not be placed on the referenced public notice. All ex parte presentations and memoranda filed under this section will be available for public inspection in the public file or record of the proceeding, and parties wishing to ensure awareness of all filings should review the public file or record.

NOTE 2: As a matter of convenience, the Secretary may also list on the referenced public notices materials, even if not ex parte presentations, that are filed after the close of the reply comment period or, if the matter is on reconsideration, the reconsideration reply comment period.

(5) The procedures outlined above continue in effect (except as otherwise provided under § 1.1204) until the proceeding has been decided by the Commission and is no longer subject to reconsideration by the Commission or review by any court.

(b) Unless otherwise ordered by the Commission, a non-restricted proceeding includes the following:

(1) An informal rule making proceeding conducted under section 553 of the Administrative Procedure Act (upon Commission adoption of a notice of proposed rule making), unless the proceeding concerns the allotment of a specific channel in the radio or television broadcast services, see § 1.1208(c)(2).

(2) An inquiry proceeding (upon Commission adoption of a notice of inquiry) where the Commission specifically states the proceeding is "non-restricted" because it contemplates adoption of a binding policy determination.

(3) A proceeding conducted pursuant to section 220(b) of the Communications Act for prescription of common carrier depreciation rates (upon release of a public notice of specific proposed

depreciation rates for a carrier or carriers).

(4) A petition or request for declaratory ruling at the time a formal opposition to the petition has been filed.

(5) A rule making proceeding conducted pursuant to section 201(a), 213(a), 231(c) or 222 of the Communications Act or section 201(c)(2) or 201(c)(5) of the Communications Satellite Act of 1962, if the proceeding has been formally opposed or has been set for investigation by the Commission.

(6) A tariff proceeding which has been set for investigation by the Commission under section 204 or 205 or a rate of return proceeding under Title II of the Communications Act.

NOTE: Proceedings under the statutory provisions listed in § 1.1206(b)(5) and § 1.1206(b)(6) that pertain primarily to past rates or practices of common carriers may be adjudicative proceedings subject to the provisions of § 1.1206. See 5 U.S.C. 551(4); 47 U.S.C. 409(c)(1)(2)(d); *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

(7) A proceeding under section 221(a) (telephone acquisitions and consolidations) of the Communications Act from the time a formal request for hearing has been made by an entity specified in that section.

(8) A proceeding under section 214(a) (extension of lines) of the Communications Act at the time a formal opposition has been filed and prior to designation for hearing, see § 1.1206(c)(3).

(9) A proceeding involving a request for information filed pursuant to the Freedom of Information Act, 5 U.S.C. 552, upon the filing of a formal opposition to the request or, in a proceeding where the requested information is the subject of a request for confidentiality, upon the filing of the FOIA request.

(10) A proceeding before a Joint Board or a proceeding before the Commission involving a recommendation from a Joint Board unless the proceeding is specifically classified as an adjudicative proceeding.

NOTE: Unless otherwise ordered by the Commission, Joint Boards shall have the authority to modify the ex parte rules as necessary in a particular proceeding to promote fair and efficient decisionmaking.

[52 FR 21052, June 4, 1987, as amended at 52 FR 37480, Oct. 7, 1987; 54 FR 29038, July 11, 1989]

RESTRICTED PROCEEDINGS

§ 1.1208 Restricted proceedings.

(a) Unless exempted under § 1.1204(b), ex parte presentations are prohibited in restricted proceedings. The prohibition continues in effect until the proceeding has been decided or a settlement or agreement by the parties has been approved by the Commission and such decision or approval is no longer subject to reconsideration by the Commission or to review by any court.

(b) No person shall make an ex parte presentation in a proceeding that could become restricted even though the proceeding is not restricted at the time if:

(1) That person intends to file a mutually exclusive application which would cause the proceeding to become restricted; or

(2) That person intends to file an opposition, complaint, or objection which would cause the proceeding to become restricted.

NOTE: The prohibition in § 1.1208(b)(2) is inapplicable to complaint proceedings under section 308 of the Communications Act.

(c) Unless governed by § 1.1204 or § 1.1206, the following are restricted proceedings:

(1)(i) Any proceeding specified in paragraph (c)(1)(ii) of this section is restricted from the day on which any of the following has occurred:

(A) The release of an order designating the proceeding for hearing (unless a hearing has been subsequently waived pursuant to § 1.92 of this chapter);

(B) The filing of a formal opposition or formal complaint;

(C) The release of a public notice apprising the public of the filing of a mutually exclusive application. *Provided, however,* That if a person has actual knowledge that a mutually exclusive application has been filed prior to the release of the public notice, that person is prohibited from making an ex parte presentation from the moment of such actual knowledge. The term "public notice" as used in this subsection means the public notice issued at regular intervals listing all applications and major amendments thereto which have been tendered (or, in non-broadcast services, accepted) for filing. (See §§ 1.564(c), 1.962(e) and 21.27(b) of this

chapter.) When the Commission issues a specific public notice stating that there is a possibility of conflict between the applications, then the term "public notice" shall refer to the specific public notice rather than that issued at regular intervals.

(ii) A proceeding is restricted as provided in paragraph (c)(1)(i) of this section if it is:

(A) Any adjudicative proceeding, including any proceeding conducted pursuant to section 303(l) (classification and qualifications of radio station operators); section 303(m) (suspension of radio licenses); sections 308 and 309 (application for licenses); section 310 (holding and transfer of licenses); section 312 (administrative sanctions); section 315 (facilities for candidates for public office); section 318 (modification of construction permits or licenses) of the Communications Act.

NOTE: See also Note to § 1.1204 (a)(1) through (3).

(B) Any proceeding under section 206 (liability of carriers for damages); section 207 (recovery of damages); section 208 (complaints); section 212 (interlocking directorates); section 214(d) (line extensions); section 234(b)(1) (pole attachments) of the Communications Act.

(C) Any proceeding under section 201(e)(6), (7), (9) or 304(f) of the Communications Satellite Act of 1962.

(D) Any request for an order to show cause, any special relief or waiver proceeding conducted pursuant to or under any of the provisions listed in paragraph (c)(1)(ii) (A), (B), or (C) of this section or any cable television special relief or waiver proceeding.

NOTE: See § 1.1204(a)(6) regarding the ex parte treatment of requests for waiver or for special permission made in the context of a particular tariff filing as part of the tariff review process.

(2) An informal rule making proceeding concerning the allotment of a channel in the radio broadcast or television broadcast services (see *Sangamon Valley Television Corporation v. United States*, 269 F.2d 221, 224 (DC Cir. 1959)) at the time of adoption of the notice of proposed rule making or the filing of an opposition to a petition for rule making, whichever is earlier.

(3) A proceeding conducted pursuant to section 214(a) of the Communications Act that has been designated for hearing.

(4) A proceeding in which an order to show cause has been released.

(5) Any other proceeding that the Commission designates as restricted.

[52 FR 21052, June 4, 1987, as amended at 52 FR 37460, Oct. 7, 1987; 52 FR 39042, Oct. 18, 1987]

PROHIBITION ON SOLICITATION OF PRESENTATIONS

§ 1.1210 Prohibition on solicitation of presentations.

No person shall solicit or encourage others to make any presentation which he or she is prohibited from making under the provisions of this subpart.

[52 FR 21052, June 4, 1987, as amended at 52 FR 37460, Oct. 7, 1987]

PROCEDURES FOR HANDLING OF PROHIBITED EX PARTE PRESENTATIONS

§ 1.1212 Procedures for handling of prohibited ex parte presentations.

(a) If a prohibited oral ex parte presentation is initiated, the person to whom it is addressed shall advise the person initiating it that the presentation is prohibited and terminate the discussion.

(b) If a prohibited oral ex parte presentation has been made, the Commission personnel to whom the presentation was made shall forward to the Managing Director a statement containing the following information:

- (1) The name of the proceeding.
- (2) The name and address of the person making the presentation and that person's relationship (if any) to the parties to the proceeding or to their attorneys.
- (3) The date and time of the presentation, its duration, and the circumstances (telephone, personal interview, casual meeting, etc.) under which it was made.
- (4) A brief summary of the substance of the presentation.
- (5) Whether the person making the presentation persisted in doing so after having been advised that the presentation was prohibited.

(6) The date and time at which the statement was prepared.

(c) Written ex parte presentations that are prohibited shall be forwarded by the person receiving them to the Managing Director. If the circumstances in which such a presentation was made are not apparent from the presentation itself, a statement describing those circumstances shall be submitted to the Managing Director with the presentation.

(d) Prohibited *written* ex parte presentations, all statements and correspondence relating thereto, all statements and correspondence relating to prohibited *oral* ex parte presentations shall be placed in a public file which shall be associated with, but not made a part of, the file or record of the proceeding to which the presentations pertain. In a proceeding which has not yet been designated hearing, no such presentations, statements or correspondence relating thereto, shall be considered in determining the merits of the proceeding except upon notice and disclosure to the parties to the proceeding. Once a proceeding has been designated for hearing, such materials may be considered in determining the merits of a restricted proceeding only if they are made a part of the record of the proceeding.

(e) If the Managing Director determines that an ex parte presentation is prohibited by this subpart, he shall notify the parties to the proceeding that a prohibited ex parte presentation has occurred. If the Managing Director determines that the public interest so requires, he shall serve upon the parties to the proceeding copies of the presentation or, if it was oral, a summary of the presentation, as well as any statements or correspondence describing the circumstances in which it was made. Service by the Managing Director shall not be deemed to cure any violation of the rules against prohibited ex parte presentations.

(f) If circumstances satisfy the Managing Director that notice of a prohibited presentation under paragraph (e) of this section would be unduly burdensome because the parties to the proceeding are numerous, he may (in lieu of notice to the parties) issue a public notice that a prohibited presentation

has been made in the proceeding. Where a determination has been made that disclosure of the prohibited presentation would be appropriate under paragraph (e) of this section and circumstances satisfy the Managing Director that service of copies of the prohibited presentation would be unduly burdensome because the parties to the proceeding are numerous or because the materials relating to the presentation are voluminous, he may issue a public notice that copies of the presentation and/or materials relating to it are available for public inspection.

(g) A copy of any statement describing the circumstances in which any prohibited *ex parte* presentation was made shall be forwarded to the person who made the presentation. Within 10 days thereafter, the person who made the presentation may file with the Managing Director a notarized statement regarding the presentation and the circumstances in which it was made. If the Managing Director deems it appropriate, he shall serve copies of the notarized statement upon parties to the proceeding.

(h) Where a restricted proceeding is perceived by the public as involving a major statement of Commission policy and precipitates a substantial amount of correspondence from the general public, the above procedures with respect to such correspondence will not be following; however, such correspondence and materials related thereto shall be placed in a public file and made available for inspection.

[52 FR 21062, June 4, 1987, as amended at 52 FR 37460, Oct. 7, 1987]

§ 1.1214 Disclosure of information concerning violations of this subpart.

Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed, shall promptly advise the Managing Director in writing of all the facts and circumstances concerning the matter which are known to him.

SANCTIONS

§ 1.1216 Sanctions.

(a) *Parties.* (1) Upon notice and hearing, any party to a restricted proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to advise the Managing Director of the facts and circumstances concerning any such violation, may be disqualified from further participation in that proceeding. Such alternative or additional sanctions as may be appropriate may be imposed.

(2) To the extent consistent with the interests of justice and the public, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected.

(b) *Commission personnel.* For violations of the provisions of this subpart by Commission personnel refer to Administrative Order No. 10.

(c) *Other persons.* Such sanctions as may be appropriate under the circumstances shall be imposed upon other persons who violate the provisions of this subpart.

(d) The sanctions outlined in paragraphs (a)(1), (b), and (c) of this section shall also apply in non-restricted rule-making proceedings, but the sanction outlined in paragraph (a)(2) of this section shall not apply in such proceedings.

Interstate Commerce Commission

PART 1102—COMMUNICATIONS

AUTHORITY: 49 U.S.C. 10821; 5 U.S.C. 559.

§1102.1 How addressed.

All communications should be addressed to the Secretary of the Commission, Interstate Commerce Commission, Washington, DC 20423 unless otherwise specifically directed by another Commission regulation. All communications should designate the docket number and title, if any. The person communicating shall state his address, and the party he represents.

[47 FR 49648, Nov. 1, 1982]

§1102.2 Ex parte communications prohibited; penalties provided.

(a) *Definitions.* (1) "On-the-record proceeding" means any matter described in Sections 556-557 of the Administrative Procedure Act (5 U.S.C. 556-557) or any matter required by the Constitution, statute, Commission rule, or by decision in the particular case, that is decided solely on the record made in a Commission proceeding.

(2) "Person who intercedes in any proceeding" means any person, partnership, corporation, or association, private or public, outside of the Commission which is neither a party nor party's agent, that volunteers a communication that it has reason to know may advance or adversely affect the interest of a party or party's agent in any proceeding before the Commission.

(3) *Ex Parte* communication concerning the merits means an oral or written communication by or on the behalf of a party which is made without the knowledge or consent of any other party that could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(b) *Communications that are not prohibited.* (1) Any communication to which all the parties to the proceeding agree, or on which the Commission formally rules, may be made on an *ex parte* basis:

(2) Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which it is interested;

(3) Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publication with respect to pending on-the-record proceedings.

(c) *Prohibitions.* (1) No party, counsel, agent of a party, or person who intercedes in any on-the-record proceeding shall engage in any *ex parte* communication concerning the merits of the proceeding with any Commissioner, hearing officer, joint board member, employee board member or employee of the Commission who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Commissioner, hearing officer, joint board member, employee board member or employee of the Commission who participates, or is reasonably expected to participate, in the decision in an on-the-record proceeding shall invite or knowingly entertain any *ex parte* communication concerning the merits of a proceeding or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* The prohibitions against *ex parte* communications concerning the merits of a proceeding apply from the date on which a proceeding is noticed for oral hearing or for the taking of evidence by modified procedure, or when the person responsible for the communication has knowledge that the proceeding will be so noticed, or at any time the Commission, by rule or decision, specifies.

(e) *Proceare required of Commission members and employees upon receipt of ex parte communications concerning the merits of a proceeding.* Any person who receives an *ex parte* communication concerning the merits of a proceeding must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Secretary of the Commission. The Secretary shall place all of the material in the correspondence section of the public docket of the proceeding. A recipient of such *ex parte* communication, who has doubt as to the nature of the communication, may request a ruling on the question from the Commission's Designated Agency Ethics Official. The Designated Agency Ethics Official shall promptly reply to such requests. The Secretary shall promptly notify the Chairman of the

Commission of such *ex parte* communications sent to the Secretary. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) *Sanctions.* (1) The Commission may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited *ex parte* communication concerning the merits of a proceeding.

(2) The relief or benefit sought by a party to a proceeding may be denied if the party, or his agent knowingly and willfully violates the foregoing rules.

(3) The Commission may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Commission employee who knowingly and willfully violates the foregoing rules.

[47 FR 49548, Nov. 1, 1982, as amended at 58 FR 42027, Aug. 6, 1993]

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**SIGNIFICANT CHANGES IN EX PARTE RULES
PROPOSED IN CC DOCKET NO. 95-21**

**April 25, 1995
Washington, D.C.**

In CC Docket No. 95-21, the Federal Communications Commission ("FCC" or "Commission") is proposing significant changes to the ex parte rules which are codified in Sections 1.1200 through 1.1216, 47 CFR §§ 1.1200 - 1.1216. This paper addresses the more significant proposed changes, some of which are evident from the proposed changes to the captions of the rules (the proposed changes are in bold).

1.1200	Introduction
1.1202	Definitions
1.1203	Sunshine Period Prohibition (Sunshine and Circulation Period Prohibition)
1.1204	General Exceptions (Exempt Ex Parte Presentations)
1.1206	Non-restricted Proceedings; Ex Parte Presentations Generally Permissible But Subject To Disclosure (Permit-But-Disclose Proceedings)
1.1208	Restricted Proceedings
1.1210	Prohibition On Solicitation Of Presentations
1.1212	Procedures For Handling Of Prohibited Ex Parte Presentations
1.1214	Disclosure Of Information Concerning Violations Of This Subpart
1.1216	Sanctions

GENERAL APPROACH. The basic purpose of the Commission is to replace many of the provisions of the existing rules which reference numerous specific types of proceedings (e.g. pioneer preference requests are a separate type of proceeding) and how each is handled under the rules with concepts that set forth operating principles that are intended to be more easily understood and applied.

CLASSIFICATION OF PROCEEDINGS. Under the proposed rules, proceedings are either:

- (1) **Exempt** as defined in 1.1204 to which the ex parte prohibitions do not apply; or
- (2) **Restricted** as defined in 1.1208 and ex parte presentations are prohibited; or
- (3) **Permit-but-disclose** as defined in 1.1206. Generally, all proceedings are permit-but-disclose unless they are either exempt or restricted.

Comment. The definition under the existing rules of **Non-Restricted** proceedings would be eliminated. The Commission concludes that this definition is misleading since a "non-restricted" proceeding does, in fact, have restrictions. In effect, the permit-but-disclose classification equates to non-restricted proceedings.

RESTRICTED PROCEEDINGS. In perhaps the most significant change, adjudicative and quasi-adjudicative proceedings are no longer restricted unless:

- (1) they have been designated for hearing; or
- (2) a Public Notice has been released of mutually exclusive applications that will not be resolved by lottery or auction.
- (3) The third category of restricted proceeding is any proceeding that the Commission, after consultation with the General Counsel, determines should be restricted.

Existing Rules apply the ex parte prohibition to applications, waivers, etc. to which a formal opposition has been filed. The proposed rules apply the permit-but-disclose standard to such applications, and make them restricted only when they are designated for hearing. The Commission, although recognizing that there are conflicting judicial decisions, concludes that the real issue is that decisions be made on the basis of the public record, and not on the basis of off-the-record information. In the Commission's analysis, this concern with off-the-record material is eliminated under permit-but-disclose procedures.

Comment. The Notice makes clear that Commission personnel are not required to entertain an ex parte presentation. Moreover, there is nothing in the proposed rules that requires Commission personnel to hear ex parte presentations from other parties if he or she entertains an ex parte presentation from one party.

Under the proposed simplified rules an application is subject to the permit-but-disclose rules as soon as it is filed; however, there is no need to make a disclosure until there is another party to the proceeding. In effect, there should be no change in applicants contacting the FCC staff to discuss uncontested applications.

EXEMPT PROCEEDINGS. Eight types of proceedings are defined in 1.1204(a) as exempt from the ex parte prohibitions applicable to restricted proceedings, the permit but disclose proceedings and the Sunshine Agenda limitations. (E.g., presentation to General Counsel on matter on judicial review).

The proposed rules (1.1204(b)) exempt from the permit but disclose requirements (i) notice of inquiry proceedings, and (ii) complaint proceedings in which the complaint is not served on the target (unless it is a formal complaint under 47 U.S.C. §208).

PERMIT-BUT-DISCLOSE. If a proceeding is not restricted or a presentation is not exempt, then ex parte presentations are subject to the permit-but-disclose requirements under proposed 1.1206(a). Under proposed 1.1206(b), the disclosure requirement starts in a rule making proceeding when the petition is filed and in any proceeding other than a rule making, whenever a person becomes a party to the proceeding.

Proposed 1.1206(d) specifies what must be contained in the disclosure and when it must be made. If an oral ex parte presentation is made a memorandum must be filed with the Secretary and delivered to the Commission employee within three days. The Commission employee may file his or her own memorandum if the initial memorandum is inadequate.

STATUS INQUIRIES. The definition of a Presentation under 1.1202(a) is retained, including the exclusion for inquiries "relating solely" to the status of a proceeding and the approximate time for action. The language explaining when a status inquiry strays into an ex parte "presentation" is modified. If the contact states why timing is important to a particular party (e.g. a contract provision will expire), or why the proceeding should be expedited for reasons other than administrative delay, then it will be considered to be an ex parte presentation.

SUBSTANCE AND TIMING OF DISCLOSURE. The existing rules require that a memorandum (or the writing if the ex parte contact is in writing) of an ex parte presentation be filed with the FCC on the same day it occurs and that it is only necessary to include new

information not previously submitted in written material. Under the proposed rules 1.1206(d), the **one day** requirement is expanded to **three days**. In addition, the memorandum of an oral ex parte presentation must contain a **summary of the entire presentation**, even if it is repetitive of earlier written material.

Comment. There is no requirement that a permit-but-disclose ex parte memorandum or ex parte pleading be served on other parties. Rather, all that is required is that the Secretary issue a public notice of ex parte presentations and place copies in the public record. A Note to 1.1206 makes it clear that the public notices are not infallible, and that to be sure parties should review the record of proceedings.

JURISDICTION. The proposed rules change the jurisdiction for questions concerning the ex parte rules and violations of those rules from the Managing Director's Office to the **General Counsel**.

Comment. Under proposed 1.1214(b), a person may contact the General Counsel in advance if he or she is concerned that a contact may violate the ex parte rules.

CIRCULATION ITEMS AND THE SUNSHINE PERIOD. The proposed rules (1.1203) continue the prohibition on any presentation, whether ex parte or not, during the Sunshine Agenda period, which runs from the release of a Public Notice that an item is on a open agenda meeting until it is resolved by release of the text of the decision or release of a public notice that the item is off the agenda. The proposed rules expand this limitation to include **circulation items** from the date of the issuance of a news release of a decision until the text of the decision is released.

Comment. The proposed rule would include in the limited exceptions to the Sunshine prohibitions, attendance by Commissioners and Commission decision-making personnel at seminars, conferences, etc. at which topics related to an item are discussed.

DECISION-MAKING PERSONNEL. The definition of decision-making personnel to whom ex parte presentations are prohibited and their role in the decision-making process are revised in case any ambiguity existed. Existing Rule 1.1202(c) defines decision-making personnel to include "staff who may reasonably be expected to become involved in the decisional process". Under the proposed rule, staff are considered to be decision-making "with respect to decisions, rules, and orders in which their Bureau or Office participates in enacting, preparing, or reviewing."

Comment. The proposed changes eliminate the issue of whether certain staff can "reasonably" be expected to be involved in a decision, and seems to broaden their involvement to "enacting, preparing or reviewing" a decision.

PARTY DEFINED. Under the proposed rule, 1.1202(d) would be added **defining parties** in non rule making proceedings as the person who files an application, waiver request, etc. and "any person making a written submission regarding such filing **which is served on the filer.**" In complaint proceedings, the same concept of party appears, that is, a party includes "any person who files a complaint **which is served** on the subject of the complaint."

Comment. In rule making proceedings members of the public are defined as parties for purposes of the ex parte rules. The Commission proposes to continue the policy that determination of party status for purposes of the ex parte rules is not controlling on whether there is standing for other purposes of the rules.

MUTUALLY EXCLUSIVE APPLICATIONS. As noted above, under the proposed rules (1.1208) mutually exclusive applications are restricted proceedings unless they are subject to selection by lottery or auction.

Comment. The existing rule provides that the proceeding would be restricted if the contact is initiated by a person who "intends to file an application that would cause the proceeding to become restricted." The proposed rule seems to apply only after an application has been filed, even though a public notice has not yet issued indicating the filing of mutually exclusive applications.

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